IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL RINALDI, Petitioner,	:	
v.	:	CIVIL ACTION
FRANK GILLIS, and THE DISTRICT ATTORNEY OF THE COUNTY OF DELAWARE, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.	:	No. 03-1641

MEMORANDUM & ORDER

YOHN, J. March _____, 2005

Petitioner Michael Rinaldi, a prisoner at the State Correctional Institution at Coal, Pennsylvania, brings this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. United States Magistrate Judge Carol Sandra Moore Wells filed a report and recommendation ("report & recommendation") recommending denial of the petition, petitioner filed objections to the report & recommendation, the Commonwealth responded to the objections, and both parties filed supplemental briefs. For the reasons that follow, I will overrule petitioner's objections, adopt the magistrate judge's recommendation, and dismiss the petition.

I. BACKGROUND[1]

[1]The facts in this section are substantially similar to the facts set forth in the state and federal court records and the magistrate judge's report and recommendation. *See Commonwealth v. Rinaldi*, No. 3323-82 (C.P. Del. Cty. May 26, 1983); *Commonwealth v. Rinaldi*, No 3323-82 (C.P. Del. Cty. Feb. 28, 2001); *Commonwealth v. Rinaldi*, No 1522 EDA 2000 (Pa. Super. Ct. Jan. 2, 2002); *Commonwealth v. Rinaldi*, No. 807 EDA 2003 (Pa. Super. Ct. May 13, 2004); *Rinaldi v. Gillis*, No. 98-2301, 2000 U.S. Dist. LEXIS 3348 (E.D. Pa. Mar. 21, 2000); *Rinaldi v.*

On May 19, 1980, petitioner Michael Rinaldi, Theodore DiPretoro, and Edward Bianculli, Jr. drove to a secluded marsh near the Philadelphia Airport. DiPretoro and Bianculli exited the car and walked behind a group of tall weeds, where DiPretoro shot and killed Bianculli. Petitioner remained in the car during the shooting. Two years later, DiPretoro began cooperating with the FBI. He confessed to Bianculli's murder and implicated petitioner in the crime. DiPretoro also admitted participating in another mob-related murder. On June 18, 1982, petitioner was arrested for Bianculli's death and charged with first degree murder and criminal conspiracy.

At trial, DiPretoro was the Commonwealth's chief witness against petitioner. DiPretoro testified that petitioner alone planned Bianculli's murder and that petitioner ordered DiPretoro to kill Bianculli at the murder scene. (N.T. Rinaldi Trial, Vol. I at 90, 94.) DiPretoro also testified that he made a deal with the prosecution in exchange for his testimony against petitioner, but asserted that he made no additional arrangements with the prosecution in connection with other crimes. (*Id*. at 72–73, 99, 109.)

Petitioner also testified at trial. He admitted waiting in the car while DiPretoro shot Bianculli, but claimed that he was not aware of the plot until after DiPretoro returned to the car. (N.T. Rinaldi Trial, Vol. II at 83–84.)

The jury found petitioner guilty on both charges and on June 6, 1983, the Court of Common Pleas of Delaware County sentenced petitioner to life imprisonment for the murder charge and to a concurrent term of five to ten years for conspiracy. *Commonwealth v. Rinaldi*, No 1522 EDA 2000, slip op. at 1 (Pa. Super. Ct. Jan. 2, 2002). The Superior Court affirmed the

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Di Gillis, No. 03-1641, 2003 U.S. Dist. LEXIS 24358 (E.D. Pa. Dec. 23, 2003).

trial court's judgment in an order dated January 25, 1985, and on September 22, 1987, the Pennsylvania Supreme Court denied *allocatur* review. *Commonwealth v. Rinaldi*, 490 A.2d 13 (Pa. Super. Ct. 1985); *Commonwealth v. Rinaldi*, 533 A.2d 91 (Pa. 1987).

On August 25, 1994, Petitioner filed his first petition for collateral relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, *et seq*. On March 13, 1995, the PCRA Court denied the petition pursuant to 42 Pa. Cons. Stat. § 9543(b), which provided that a court may dismiss a PCRA petition for delay in filing if the delay prejudices the Commonwealth. The court found that petitioner's nearly seven-year delay in filing had prejudiced the Commonwealth.[2] *Commonwealth v. Rinaldi*, No. 3323-82, slip op. at 6–9 (C.P. Del. Cty. Jan. 25, 1996). The Superior Court affirmed on June 26, 1996, and the Supreme Court refused *allocatur* review on May 9, 1997. *Commonwealth v. Rinaldi*, 685 A.2d 213 (Pa. Super. Ct. 1996); *Commonwealth v. Rinaldi*, 694 A.2d 621 (Pa. 1997).

On May 1, 1998, petitioner filed his first federal petition for habeas relief with this court. On March 21, 2000, I dismissed the petition after concluding that § 9543(b) created an independent and adequate state procedural bar to consideration of the merits of petitioner's claims and that petitioner had not established either cause and prejudice or actual innocence to overcome his procedural default. *Rinaldi v. Gillis*, No. 98-2301, 2000 U.S. Dist. LEXIS 3348, at *31–*32 (E.D. Pa. March 21, 2000). The Third Circuit declined to issue a Certificate of Appealability on December 22, 2000. *Rinaldi v. Gillis*, No.00-1270, (3d Cir. Dec. 22, 2000).

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[2]Specifically, the court found that the Commonwealth would be unable to retry the case because all files relating to petitioner's case had been lost and neither the district attorney nor petitioner's trial counsel had a sufficient recollection of the trial to reconstruct the files for a hearing. *Commonwealth v. Rinaldi*, No. 3323-82, slip op. at 4, 5, 8 (C.P. Del. Cty. Jan. 25, 1996). The court also found that petitioner failed to properly explain his delay in filing. *Id*. at 9.

On September 9, 1999, petitioner filed a second PCRA petition. On October 19, 1999, the PCRA Court notified petitioner of its intent to dismiss his petition without a hearing. *Commonwealth v. Rinaldi*, No. 3323-82, (C.P. Del. Cty. Oct. 19, 1999). That December, petitioner supplemented his pleadings with "newly discovered evidence," which he allegedly learned after reading the Pennsylvania Superior Court's opinion in DiPretoro's PCRA proceedings, *Commonwealth v. DiPretoro*, No. 2928 Phila 1997 (Pa. Super. Ct. Nov. 19, 1998). Petitioner claimed that the Commonwealth failed to disclose inconsistent statements that DiPretoro made to investigators. Nonetheless, on February 29, 2000, the PCRA Court dismissed petitioner's motion for newly discovered evidence, and dismissed petitioner's second PCRA petition as untimely pursuant to 42 Pa. Cons. Stat. § 9545(b), which imposes a one-year statute of limitations on PCRA petitions. *Commonwealth v. Rinaldi*, No. 3323-82, (C.P. Del. Cty. Mar. 3, 2000) (order). Petitioner appealed this order to the Pennsylvania Superior Court and the trial court issued its opinion pursuant to Pa. R. App. P. 1925(a) on February 29, 2001. *See Commonwealth v. Rinaldi*, No. 3323-82 (C.P. Del. Cty. Feb. 28, 2001).

While petitioner's appeal was pending, petitioner filed a *pro se* civil suit under 28 U.S.C. § 1983 in this court to recover the "new" evidence. Petitioner sought discovery of documents in DiPretoro's criminal file that relate to statements that DiPretoro made to police officers in the course of the initial investigation. On March 19, 2001, United States District Judge Harvey Bartle III ordered the Delaware County District Attorney to provide petitioner with these files. *Rinaldi v. Gaston*, No. 00-4933 (E.D. Pa. Mar. 19, 2001) (order). Petitioner received these files on April 19, 2001. The documents revealed that DiPretoro initially denied involvement in the Bianculli murder, and later named another individual, not petitioner, as his accomplice in the

crime. (Ex. A–C to Pet. for Writ of Habeas Corpus.) The documents also revealed that contrary to DiPretoro's testimony, he was negotiating a second plea bargain with the government at the time of petitioner's trial. The Commonwealth failed to disclose any of this information at the time of trial.

Petitioner immediately presented this evidence in his appeal brief to the Pennsylvania Superior Court. However, on November 20, 2001, the Superior Court granted the Commonwealth's motion to strike this evidence because it was not included in the certified record. *Commonwealth v. Rinaldi*, No. 1522 EDA 2000 (Pa. Super. Ct. Nov. 20, 2001) (order). Then, on January 2, 2002 the Superior Court affirmed the lower court and dismissed petitioner's second PCRA petition as untimely. *Commonwealth v. Rinaldi*, No. 1522 EDA 2000 (Pa. Super. Ct. Jan. 2, 2002).

Next, petitioner attempted to file a petition for *allocatur* review with the Pennsylvania Supreme Court, but failed to file within the thirty-day filing deadline. *See* Pa. R. App. P. 1113(a) ("[A] petition for allowance of appeal shall be filed with the Prothonotary of the Supreme Court within 30 days after the entry of the order of the Superior Court or the Commonwealth Court sought to be reviewed."). Petitioner claims that the Pennsylvania Attorney General's Office mislead his attorney and caused him to file his *allocatur* petition late Specifically, petitioner alleges that the Attorney General's Office mistakenly told petitioner's counsel[3] that his *allocator* petition should be filed with the Attorney General instead of the Prothonotary of the Supreme Court. On February 1, petitioner's deadline for filing an *allocatur* petition, the Attorney

[3]Petitioner actually alleges that a paralegal in counsel's firm received the erroneous information from the Attorney General's Office.

General's Office received the petition. The Attorney General returned the petition to petitioner's counsel instead of forwarding it to the Supreme Court. Petitioner's counsel tried to file the petition with the Supreme Court on February 5, but the court rejected the petition as untimely. On February 7, petitioner's counsel filed a petition for leave to file petitioner's *allocatur* petition out of time, but on April 30, 2002, the Supreme Court denied the petition. *Commonwealth v. Rinaldi*, No. 25 MM 2002 (Pa. Apr. 30, 2002) (order).

On June 26, 2002, Petitioner filed a third PCRA petition on the basis of the newly discovered evidence. The PCRA Court denied the petition as untimely and petitioner appealed the order to the Superior Court. *Commonwealth v. Rinaldi*, No. 3323-82 (C.P. Del. Cty. Dec. 9, 2002).

On appeal, petitioner argued that his petition was not time-barred because the Commonwealth withheld the supposedly exculpatory evidence that provides the basis for his claims. *Commonwealth v. Rinaldi*, No. 807 EDA 2003, slip op. at 5, (Pa. Super. Ct. May 13, 2004). Petitioner invoked 42 Pa. Cons. Stat. § 9545(b)(1)(i), which provides an exception to the one-year statute of limitations if "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim . . . ." This section further provides that "[a]ny petition invoking an exception [to the statute of limitations] shall be filed within 60 days of the date the claim could have been presented." *Id*. at § 9545(b)(2). The Superior Court determined that even if it assumed that the Commonwealth withheld exculpatory evidence, § 9545(b) barred review of petitioner's claims because petitioner failed to file his third

petition within sixty days of the date that he received this allegedly exculpatory information.[4] *Rinaldi*, No. 807 EDA 2003, slip op. at 5–6. Petitioner also argued that the sixty day time-limit should be tolled because the Pennsylvania Attorney General's Office interfered with his attempt to file a petition for *allocatur* review of his second PCRA petition. *Id*. at 6. The court refused to toll the sixty-day period because it determined that it was counsel's responsibility, and not the Attorney General's Office, to file a timely petition for *allocatur* review. *Id*. at 7. Petitioner did not file a petition for *allocatur* review of his third PCRA petition.

On March 18, 2003, while petitioner's third PCRA petition was still pending, petitioner filed this petition for writ of habeas corpus.[5, 6] Petitioner alleged that the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83 (1963)[7] by failing to disclose exculpatory evidence and

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[4]Rinaldi received the allegedly exculpatory evidence on April 19, 2001. However, he alleges that he could not file a third petition because his second petition was pending at the time. *See Commonwealth v. Lark*, 746 A.2d 585, 588 (Pa. 2000) ("[W]hen an appellant's PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon the expiration of the time for seeking such review.") Petitioner's time to seek *allocatur* review of his second PCRA petition expired on February 1, 2002, and if 42 Pa. Cons. Stat. § 9545(b)(1)(i) is applied, petitioner had sixty days from this date to file his third PCRA petition. Petitioner filed his third PCRA petition on June 26, 2002, more than sixty days after February 1.

[5]Before filing this petition, petitioner filed an application for authorization to file a second or successive petition with the Third Circuit pursuant to 28 U.S.C. § 2244(b)(3)(A) on December 30, 2002. The Third Circuit issued an order authorizing petitioner to file a successive petition on February 28, 2003.

[6] The magistrate judge referred to Rinaldi's petition as "*pro se*," but it is clear that Rinaldi has been represented by counsel since the filing of this current petition.

[7]In *Brady*, the Supreme Court held that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87 (1963).

failing to correct DiPretoro's false testimony at trial. (Mem. of Law in Supp. of Pet. for Writ of Habeas Corpus at 6, 15.) On July 21, 2003, the Commonwealth filed an answer. It argued that the petition should be dismissed because petitioner's third PCRA petition was still pending and consequently, petitioner had failed to exhaust his state remedies. (Mem. of Law in Opp. to Pet. for Writ of Habeas Corpus at 11–13.)

The magistrate judge filed her report and recommendation on December 29, 2003, before the Superior Court issued its opinion affirming the PCRA Court's denial of petitioner's third PCRA petition. Because petitioner's PCRA petition was still pending, the magistrate judge recommended that I deny the petition because petitioner had failed to exhaust his claims in state court. *Rinaldi v. Di Gillis*, No. 03-1641, 2003 U.S. Dist. LEXIS 24358, at *13 (E.D. Pa. Dec. 23, 2003). In a footnote, the magistrate judge observed that petitioner's claims appear time-barred under 28 U.S.C. § 2244(d)(1). *Id*. at *13 n.7. On January 7, 2004, petitioner filed objections to the report and recommendation and on January 26, 2004, the Commonwealth submitted a brief in response to the objections. Both briefs addressed the timeliness of the petition for the first time. Petitioner argued that his petition was timely filed and that the Commonwealth waived its timeliness defense because it failed to raise timeliness in its answer to the petition. (Pet'r's Objections at 9–11.) The Commonwealth contended that the petition is time-barred, that it did not waive its timeliness defense, and that petitioner is not entitled to statutory tolling[8] of the federal habeas statute of limitations. (Resp. to Objections at 12–20.)

On May 13, 2004, the Superior Court issued its opinion and petitioner's claims became

[8]The Commonwealth failed to address equitable tolling.

exhausted,[9] rendering the majority of the magistrate judge's report moot. At this court's request, petitioner and the Commonwealth have submitted supplementary briefs, which focus on the issue of procedural default.

II. STANDARD OF REVIEW

Where a habeas petition has been referred to a magistrate judge for a report and recommendation, this court reviews "those portions of the report or specified proposed findings or recommendations to which objection is made" *de novo*. 28 U.S.C. at § 636(b). After conducting this review, I "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." *Id.*

III. DISCUSSION

A. Timeliness

This petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996[10] ("AEDPA"), P.L. 104-132, 110 Stat. 1214. AEDPA imposes a one-year statute of limitations on petitions for federal habeas relief. 28 U.S.C. § 2244(d)(1). The statute provides that state prisoners must file federal habeas petitions within one year of the latest of the following four

[9]Technically, petitioner's claims were not exhausted until June 12, 2004, when his opportunity to seek *allocatur* review with the Pennsylvania Supreme Court expired.

[10]AEDPA governs §2254 habeas petitions filed on or after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

dates:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). ADEPA provides for tolling of the statute of limitations for "the time during which a properly filed application for State post-conviction or other collateral review . . . is pending . . . ." *Id*. at § 2244(d)(2). However, "the statute of limitations is not tolled under § 2244(d)(2) . . . [when] a habeas petition is pending in federal court." *Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999).

On first glance, this petition appears time-barred. Because petitioner was convicted before the effective date of AEDPA, he had until April 23, 1997 to file a federal habeas petition. *See Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998). However, petitioner's statute of limitations was tolled during the pendency of his first PCRA petition, between August 25, 1994 and May 9, 1997.[11] The statue began to run on May 9, 1997, after the Pennsylvania Supreme

[11]Arguably, the statute of limitations was not tolled during the pendency of petitioner's first PCRA petition because it was not "properly filed." *See Fahy v. Horn*, 240 F.3d 239, 243 (3d Cir. 2001) ("The AEDPA statute of limitations can only be statutorily tolled when a collateral petition for state relief was 'submitted according to the state's procedural requirements, such as the rules governing the time and place of filing.") (citation omitted). The Pennsylvania courts dismissed petitioner's first PCRA petition under 42 Pa. Cons. Stat. § 9543(b) because the petitioner's delay in filing prejudiced the Commonwealth. Nonetheless, the instant petition appears untimely regardless of whether or not the statute of limitations was tolled during this period. Thus, I will decline to decide this issue.

Court denied *allocatur* review of petitioner's first PCRA petition.[12] Petitioner filed his first federal habeas petition on May 1, 1998, 357 days after the statute began to run. While this petition was timely, it did not toll petitioner's statute of limitations. *See Jones*, 195 F.3d at 158. Hence, petitioner's time to file an additional federal habeas petition expired on May 9, 1998. Petitioner's second and third PCRA petitions, which were filed on September 9, 1999 and June 26, 2002, did not affect the AEDPA statute of limitations.

Petitioner contends the Commonwealth waived its statute of limitations defense because it failed to raise timeliness in its answer to the petition. Petitioner relies on *Robinson v. Johnson*, 313 F.3d 128, 134, 137 (3d Cir. 2002), where the Third Circuit held that a state may waive the statute of limitations defense. Recently, in *Long v. Wilson*, 393 F.3d 390 (3d Cir. 2004), the Third Circuit revisited this issue. The court held that if the state fails to assert the AEDPA statute of limitations defense in its answer, it may raise the defense after a magistrate judge has raised the issue *sua sponte*, if it does not unduly prejudice the habeas petitioner. [13] *Id*. at 401, 403. In *Long*, the court found that the habeas petitioner was not prejudiced even though the government waited fourteen months to assert the statue of limitations defense because the government raised the defense three weeks after the magistrate judge raised the issue, and because the government did not act in bad faith. *Id*. at 399, 401.

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[12]If petitioner's first PCRA petition tolled the statute of limitations, the statute began to run when the Pennsylvania Supreme Court denied allocatur, not when petitioner's time to file a petition for certiorari with the United States Supreme Court expired. *See Stokes v. Dist. Att'y of Phila. County*, 247 F.3d 539, 542 (3d Cir. 2001) (holding that a claim for post-conviction relief is no longer considered "pending" during the ninety-day period when a state prisoner may file for certiorari review in the United States Supreme Court).

[13]In *Long*, the court also concluded that nothing in AEDPA prevents a magistrate judge from raising the statute of limitations defense *sua sponte* 393 F.3d 390, 403 (3d Cir. 2004).

Here, like *Long*, the Commonwealth took a relatively short period, five weeks, to assert the statute of limitations after the magistrate judge raised the issue for the first time. *Id*. at 399. Additionally, there is no evidence that the Commonwealth acted in bad faith. Thus, I conclude that the Commonwealth may assert the AEDPA statute of limitations defense without unduly prejudicing petitioner. *See id.* at 399 ("The frustrated expectation of not having an untimely habeas petition heard on the merits does not establish prejudice sufficient to defeat an amendment to an answer.")

Nonetheless, I will decline to decide whether the petition is time-barred because there are significant issues involving alternative starting points for the statute of limitations[14] and equitable tolling,[15] which the Commonwealth has failed to address. Hence, I will move on to the issue of procedural default.

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[14]Arguably, the statute of limitations for this petition should start running on April 19, 2001, the day that petitioner received the allegedly exculpatory evidence, because the Commonwealth created an "impediment to filing an application . . . in violation of the Constitution or laws of the United States" or because that was the "date on which the factual predicate of . . . [petitioner] claims . . . could have been discovered through the exercise of due diligence." *See* 28 U.S.C. § 2244(d)(1)(B) and (D).

[15]Petitioner argues that the statute of limitations should be equitably tolled until February 1, 2002, when the time to file an *allocatur* petition for his second PCRA petition expired, because the Commonwealth failed to provide him with the allegedly exculpation evidence until sometime during the pendency of this petition. Petitioner contends that he could not file a federal habeas claim on the basis of this evidence during the pendency of his second PCRA petition because he could not file a third PCRA petition to exhaust these claims until his second PCRA petition was resolved. *See Lark*, 746 A.2d at 588 ("[W]hen an appellant's PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon the expiration of the time for seeking such review."). If so, this petition was arguably filed within AEDPA's one-year statute of limitations when petitioner applied to the Third Circuit on December 30, 2002 for permission to file a second § 2254 petition.

B. Procedural default

AEDPA requires state prisoners to exhaust claims in state court before seeking habeas relief in federal court. 28 U.S.C. § 2254(b)(1)(A). "If, however, state procedural rules bar a petitioner from seeking further relief in state courts, the exhaustion requirement is satisfied because there is 'an absence of available State corrective process.'" *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000) (quoting 28 U.S.C. 2254(b)(1)(B)(i)) (additional citation omitted). Under these circumstances, federal courts consider the claims procedurally defaulted and may not reach the merits unless the petitioner can establish "cause and prejudice" or a "fundamental miscarriage of justice."[16] *Id*. (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). This ensures that state prisoners cannot evade the exhaustion requirement of § 2254 by defaulting their federal claims in state court. *See Coleman*, 501 U.S. at 732.

Petitioner raised his two *Brady* claims in his second and third PCRA petitions. On both occasions, the Pennsylvania courts declined to reach the merits and concluded that these claims

[16]A petitioner may also challenge a procedural default by showing that the state procedural rule that triggered the default was not "independent" and "adequate." *Doctor v. Walters*, 96 F.3d 675, 683 (3d Cir. 1996). Because petitioner has not challenged the independence or adequacy of 42 Pa. Cons. Stat. § 9545(b), I need not address this argument. Moreover, the PCRA's one year time-bar and the 60-day filing deadline for claims meeting the statutory exceptions were clearly established and regularly applied at the time of petitioner's third PCRA petition. *See Stocklin v. Klem*, No 03-954, 2004 U.S. Dist. LEXIS 12241, *20 (E.D. Pa. Feb. 26, 2004) ("A review of the relevant case law reveals that the jurisdictional nature of the one-year time-bar was clearly established on December 10, 1999, and that only the exceptions enumerated in the statute may excuse an untimely PCRA petition."); *Yarris v. Horn*, 230 F. Supp.2d 577, 582–83 (E.D. Pa. 2002) ("[M]any district courts in the [T]hird [C]ircuit which have been confronted with the issue of the PCRA time-bar, have decided that it was not an independent and adequate state ground to bar federal review until *Commonwealth v. Banks*, 726 A.2d 374, was decided March 2, 1999.") (additional citations omitted); *Commonwealth v. Breakiron*, 781 A.2d 94, 98 (Pa. 2001) ("A petition invoking one of the above exceptions must be filed within 60 days of the date the claim could have been presented.") (citation omitted).

were untimely under 42 Pa. Cons. Stat. § 9545(b). *See Rinaldi*, 807 EDA 2003, slip op. at 4–7*; Rinaldi*, 1522 EDA 2000, slip op. at 3–5. Hence, petitioner's claims are procedurally defaulted.

1. *Cause and Prejudice*

Next, I must determine whether petitioner can show "cause and prejudice" or a "fundamental miscarriage of justice" to excuse the default. "The 'cause' required to excuse a procedural default must result from circumstances that are 'external to the petitioner, something that cannot fairly be attributed to him.'" *Lines*, 208 F.3d at 166 (quoting *Coleman*, 501 U.S. at 753). Examples of "cause" include a showing that "the factual or legal basis for a claim was not reasonably available to counsel," that "some interference by officials made compliance impracticable," or that "the procedural default is the result of ineffective assistance of counsel." *Murray v. Carrier*, 477 U.S. 478, 488 (1988) (citations omitted). The Supreme Court has emphasized that "a claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Id*. at 489

Petitioner contends that the Attorney General's Office's interference with his petition for *allocatur* review of his second PCRA petition caused him to file the *allocatur* petition late, which, in turn, caused him to file his third PCRA petition after the statutory time-limit.[17]

[17]Petitioner also alleges that the Commonwealth's failure to disclose exculpatory evidence caused his procedural default. However, this did not actually cause petitioner's default because the Superior Court assumed that the government initially caused petitioner's untimely filing and invoked the governmental interference exception to PCRA's statute of limitations to account for the time through April 19, 2001 when the evidence was discovered and then through February 1, 2002 when his pending second PCRA petition was finally resolved.. The court found that even if it applied this exception, petitioner's third PCRA petition was still untimely because he failed to file it "within 60 days of the date the claim could have been presented." 42 Pa. Cons. Stat. § 9545(b)(2); *Rinaldi*, No. 807 EDA 2003, slip op. at 5–6.

Specifically, petitioner claims that the Attorney General's Office (1) mistakenly told his attorney (or the attorney's paralegal) to send his *allocatur* petition to the Attorney General's Office instead of the Supreme Court and (2) failed to forward the petition to the Supreme Court. The Superior Court considered this argument and concluded that "ultimately, the responsibility for timely filing the allowance of appeal petition with the Supreme Court (in the right location) rested with Rinaldi's counsel, not with the Attorney General's Office." *Rinaldi*, No. 807 EDA 2003, slip op. at 7. I agree. As the Superior Court observed, the Pennsylvania Rules of Appellate Procedure clearly provide that petitions for *allocatur* review should be filed "with the Prothonotary of the Supreme Court." Pa. R. App. P. 1112(c). Moreover, petitioner could have easily found the Pennsylvania Supreme Court's address by contacting the Supreme Court's Prothonotary, or by consulting the Supreme Court's website, the Philadelphia Legal Directory, or local law libraries. Additionally, there is no record of a conversation between petitioner's counsel and the Attorney General's Office regarding the address of the Supreme Court, and petitioner has failed to even name the individual who allegedly provided the false information. (Resp'ts.' Supp. Br. at 21.) Further, once the Attorney General's Office received the petition, it was under no obligation to forward it to the Supreme Court.

Petitioner also contends that counsel was responsible for his untimely filing because counsel failed to advise him that the Supreme Court had rejected his *allocatur* petition until May 8, 2002, after 42 Pa. Cons. Stat. § 9545(b)(2)'s sixty-day time limit had expired. Petitioner claims that he assumed that his *allocatur* petition had been timely filed and that his second PCRA petition remained pending, tolling the sixty-day time-limit to file a third PCRA petition. He further asserts that if counsel immediately notified him when the Supreme Court rejected his

allocatur petition, he could have filed his third petition before the sixty-day time-limit expired. These allegations are insufficient to show "cause" for petitioner's procedural default because petitioner has failed to bring an independent ineffective assistance of counsel claim in state court. *See Murray*, 477 U.S. at 489 ("[A] claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.") Further, because there is no constitutional right to counsel in state post-conviction proceedings, petitioner cannot claim ineffective assistance of counsel in such proceedings. *Coleman v. Thompson*, 501 U.S. 722, 757 (1991). For these reasons, petitioner cannot show "cause" for the procedural default.[18]

2. *Fundamental Miscarriage of Justice*

Where a petitioner has failed to demonstrate "cause and prejudice," federal courts may still consider otherwise procedurally defaulted claims on habeas review if the petitioner can establish "that failure to consider the[se] claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. "Generally, this exception will apply only in extraordinary cases, i.e., 'where a constitutional violation has probably resulted in the conviction of one who is actually innocent . . . .'" *Werts v. Vaughn*, 228 F.3d 178, 193 (3d Cir. 2000) (citing *Murray*, 477 U.S. at 496). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). To establish such a claim, a petitioner must "support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence --

[18]Because petitioner has failed to show "cause" for the procedural default, I need not determine whether there was "prejudice." *See Coleman*, 501 U.S. at 750.

that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 321–22 (1995). Further, actual innocence, "does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Id*. at 329.

Petitioner asserts that evidence that DiPretoro initially denied involvement in the Bianculli murder and later named another individual as his accomplice proves petitioner's actual innocence.[19] Petitioner contends that no reasonable juror would have found him guilty at trial if the Commonwealth had disclosed DiPretoro's prior inconsistent statements because DiPretoro was the only prosecution witness and these statements would have decisively impeached his credibility. Further, petitioner argues that this evidence supports his defense theory at trial that he knew nothing of the plot to murder Bianculli.[20]

This evidence fails to satisfy the stringent standard for actual innocence. Petitioner has not presented trustworthy eyewitness accounts of the murder or any scientific or physical evidence suggesting his innocence. *See Schlup*, 513 U.S. at 321–22. Instead, petitioner presents evidence that would primarily be used to impeach DiPretoro's credibility. In *Calderon v. Thompson*, 523 U.S. 538, 562–63 (1998), the Supreme Court considered whether newly-discovered impeachment evidence satisfied the "miscarriage of justice" standard. The Court concluded that to find that such evidence would have altered the outcome of trial, it would have to assume that (1) there was little evidence of the crime apart from the testimony that this

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[19]At trial, petitioner himself denied that this other person allegedly first named by DiPretoro was present at the scene of the murder. (N.T. Rinaldi Trial Vol. 82–84.)

[20]The Commonwealth contends that none of this alleged *Brady* material was in its possession or control at the time of trial and that it was not aware of these documents until 1998.

evidence allegedly impeached, and (2) "that the jury accepted [this] testimony without reservation." *Id*. at 563. Petitioner argues that without DiPretoro's testimony the Commonwealth could not have made out a case against petitioner. However, petitioner himself admitted that he drove to the murder scene with DiPretoro and Bianculli, and was present at the time of the murder. (N.T. Rinaldi Trial, Vol. II at 83–84.) There was also other substantial impeachment evidence against DiPretoro available at trial. At trial, petitioner disputed much of DiPretoro's testimony. Additionally, DiPretoro testified that he made a deal with the prosecution in exchange for his testimony against petitioner, and admitted murdering Bianculli and participating in another mob-related killing. (N.T. Rinaldi Trial, Vol. I at 72–73, 76, 94.) After the jury heard that DiPretoro was responsible for at least two murders, I cannot assume that they "accepted [DiPretoro's] testimony without reservation." *Calderon*, 523 U.S. at 563. Hence, petitioner's impeachment evidence is insufficient to show that no reasonable juror would have found him guilty if this evidence had been presented at trial.[21]

Additionally, DiPretoro's earlier statement that an individual besides petitioner plotted Bianculli's murder is insufficient to establish petitioner's actual innocence and the guilt of some

[21]Petitioner mistakenly relies on *United States v. Starusko*, 729 F.2d 256, 260 (3d Cir. 1984), where the Third Circuit held that under *Brady v. Maryland* the government must disclose "[e]vidence impeaching the testimony of a government witness when the credibility of the witness may be determinative of a criminal defendant's guilt or innocence" and the "evidence 'creates a reasonable doubt' as to the defendant's culpability." This language sets forth the standard for material exculpatory evidence covered by *Brady*, but it does not govern the actual innocence standard, which unlike *Brady*, "does not merely require a showing that a reasonable doubt exists in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 329 (1995). Here, the merits of petitioner's *Brady* claim are not at issue. Instead, petitioner must satisfy the actual innocence standard to excuse the procedural default of his *Brady* claims. Thus, while petitioner's new evidence may be material exculpatory evidence covered by *Brady*, it is not sufficient to demonstrate actual innocence and excuse the procedural default.

other person because there is substantial evidence suggesting that petitioner was involved in the crime, including his own testimony admitting to his presence at the scene.

Petitioner has failed to show that a "fundamental miscarriage of justice" will result if the court does not consider petitioner's *Brady* claims. Hence, petitioner cannot overcome the procedural default.

IV. CONCLUSION

Because the magistrate judge's report and recommendation primarily focused on exhaustion and petitioner has since exhausted his claims, I will not adopt the report. However, after reviewing the parties' supplemental briefs, I conclude that petitioner's claims are procedurally defaulted and consequently I will adopt the magistrate judge's recommendation and dismiss the instant petition for writ of habeas corpus. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL RINALDI, Petitioner,	:	
v.	:	CIVIL ACTION
FRANK GILLIS, THE DISTRICT ATTORNEY OF THE COUNTY OF DELAWARE, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	:	No. 03-1641

ORDER

And now on this _____ day of March, 2005, upon consideration of petitioner Michael Rinaldi's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. #1), review of the United States Magistrate Judge Carol Sandra Moore Wells' Report and Recommendation (Doc. #14), consideration of petitioner's objections to the report and recommendation (Doc. #15), respondents' response thereto (Docs. #16, 19), and the parties' supplemental briefs (Docs. # 22, 23), it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED;
2. The recommendation of the magistrate judge is ADOPTED;
3. The petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is DISMISSED;
4. The petitioner having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability, *see* 28 U.S.C. § 2253(c); and
5. The Clerk shall CLOSE this case statistically.

_____

William H. Yohn, Jr., Judge